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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. 918

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. 782.

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation (appellees below), respectfully pray that a writ of certiorari issue to the Circuit Court of Appeals for the Ninth Circuit to review the decree of that court entered on January 14, 1935 [R. 733] (rehearing denied March 25,

1935 [R. 734]), reversing the decree of the District Court for the Southern District of California [R. 178], in that certain action between the above named parties which is disclosed by the certified record accompanying this petition.

Questions Presented.

1. Whether the United States Land Department has jurisdiction to survey and establish the ordinary high water mark constituting the boundary between upland of an island belonging to the public domain and state tideland bordering said island;

2. Assuming such jurisdiction, whether the patent of the United States which conveyed the said island "according to the Official Plat of the Survey of said lands" is conclusive evidence of the correct location of the boundary between the upland and adjoining tideland, within the purview of *Knight v. United Land Association,* 142 U. S. 161; *Cragin v. Powell,* 128 U. S. 691; and other applicable rulings; or whether the matter is always open for independent reexamination in the courts;

3. The United States Deputy Surveyor having been specifically instructed to note "the height of the Island above high water mark, and the area of arable lands thereon" and having reported in his field notes that his survey stations were located "at ordinary high water mark", that he had "meandered around the island at ordinary high water mark" and that the island was

"from 3 to 5 feet above ordinary high tide", is the patent (based upon such survey and plat made from it), conclusive evidence that the stations or meander corners of the survey were correctly located at ordinary high water mark, there being no claim of fraud in the survey;

4. The official plat of said survey having shown as the only boundaries of said island traverse lines drawn between such meander corners, do said traverses, as matter of law, constitute merely meanders,—the parties in effect having agreed and the trial court having found that they were boundaries;

5. Is "ordinary high water mark", which defines the boundary between upland and tideland, determined

(a) by the physical marks impressed by the waters upon rocks, earth and vegetation; or

(b) by the line of the neap tides in accordance with the decisions of the California Supreme Court, such as *Teschemacher v. Thompson*, 18 Cal. 11, and *Otey v. Carmel Sanitary Dist.*, 219 Cal. 310, 313; or

(c) by a contour representing the line of mean high tide, which is .8 foot higher than the mean of the neaps.

6. Can an appellate court, without examining the sufficiency of plaintiff's proofs, properly reverse a quiet title (or ejectment) action upon the ground that a counterclaim asserting defendants' title has not been adequately proved, where the denials of plaintiff's title raise the same issues as the counterclaim?

Statement.

At the time of admission of the state of California on September 9, 1850, there was situated in San Pedro Bay (a navigable tidewater), an island known as Mormon Island, which constituted a part of the public domain of the United States and which was never surveyed until May 22, 1880 [R. 165-166, 44, 111].

At that time W. H. Norway, United States Deputy Surveyor, acting pursuant to a contract [R. 662] with Theodore Wagner as Surveyor General of the United States for California, commenced a survey of the said island. The contract required Norway "in strict conformity with the printed Manual of Surveying Instructions, * * * and with such special Instructions as he may receive from the Surveyor-General" to "well, truly and faithfully run, measure and mark *all lines** necessary *to survey* and connect with the lines of public surveys, the *tract of land* in Township 5 South, Range 13 West, San Bernardino Meridian, known as 'Mormon Island', and supposed to be in the N. W. ¼ of Section 8 of said township" [R. 663]. As this referred to an island, the surveyor *could comply only by delineating the high water mark; there were no other boundaries.* Through said Surveyor General the Commissioner of the General Land Office required Norway, in executing the survey, "to note the width and depth of the channels upon either side of the Island, the *heighth of the Island above high water mark,* and the area of the arable lands thereon" [R. 671]. The survey was completed on May 24, 1880. Norway returned to the Surveyor General his field

*All italics ours unless otherwise indicated.

notes [R. 684-5], which stated that his meander corner No. 1 was established at "ordinary high water mark" and that he did "meander around the island at ordinary high water mark", giving his stations, courses and distances, and further saying: "Said *Mormon Island is from 3 to 5 feet above ordinary high tide* * * * The area of available land is about 18 acres as indicated in field notes of Survey" [R. 685], the exact acreage indicated therein being 18.88 acres [R. 684]. The Surveyor General, on August 26, 1880, attached to said field notes a certificate that the same had been "critically examined, and the necessary corrections and explanations made, the said field notes and the surveys they described are hereby approved" [R. 687]; he also on said day attached to a plat of the said Norway survey a certificate that the same "is strictly conformable to the field notes of the surveys thereof on file in this office, which have been examined and approved"; a copy of the said plat, Exhibit "D", is found in Vol. 2 of the Record filed in this court,—the "Book of Exhibits", p. 31. Thereafter on November 12, 1880, the Commissioner found that "The returns of survey made of Mormon Island * * *, under his contract * * * have been found correctly surveyed", and authorized filing with the Register of the proper Land Office of the plat as approved by the Surveyor General on August 26, 1880 [R. 673]; the said Mormon Island was officially designated as Lot One of Section 8, of Township 5 South, Range 13 West, San Bernardino Meridian [R. 168].

No appeal from the action of the Commissioner of the General Land Office in approving the said survey and plat or any other objection thereto was taken or made by the

State of California or any other person whomsoever [R. 168].

Said plat having been duly filed, a patent was on December 30, 1881, duly issued by the United States, pursuant to the preemption laws then in force, to William Banning, conveying to him "lot numbered one, of section eight, in township five south, of range thirteen west of San Bernardino Meridian, in California, containing eighteen acres, and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of the said Lands, returned to the General Land Office by the Surveyor General" [R. 169, 660].

Respondent claims title, as successor to the State, under a statutory tideland grant of May 1, 1911 [Cal. Stats. 1911, p. 1256; R. 7].

Borax Consolidated, Limited, in 1923 [R. 690], succeeded to Banning's title to the northerly portion of the island, purchasing same in the belief that all the land conveyed to it constituted upland and having "no reason to believe that any portion thereof was tideland" [R. 55, 117]. It was conceded at the trial that petitioner has good title to the demanded premises except to such extent as may be determined to be tideland [R. 212, 637, 689]. Pacific Coast Borax Company is merely the agent of the other petitioner, in possession of the disputed lands. [R. 180.]

Cast in the form of a suit to quiet title, the instant action was brought by the City of Los Angeles for re-

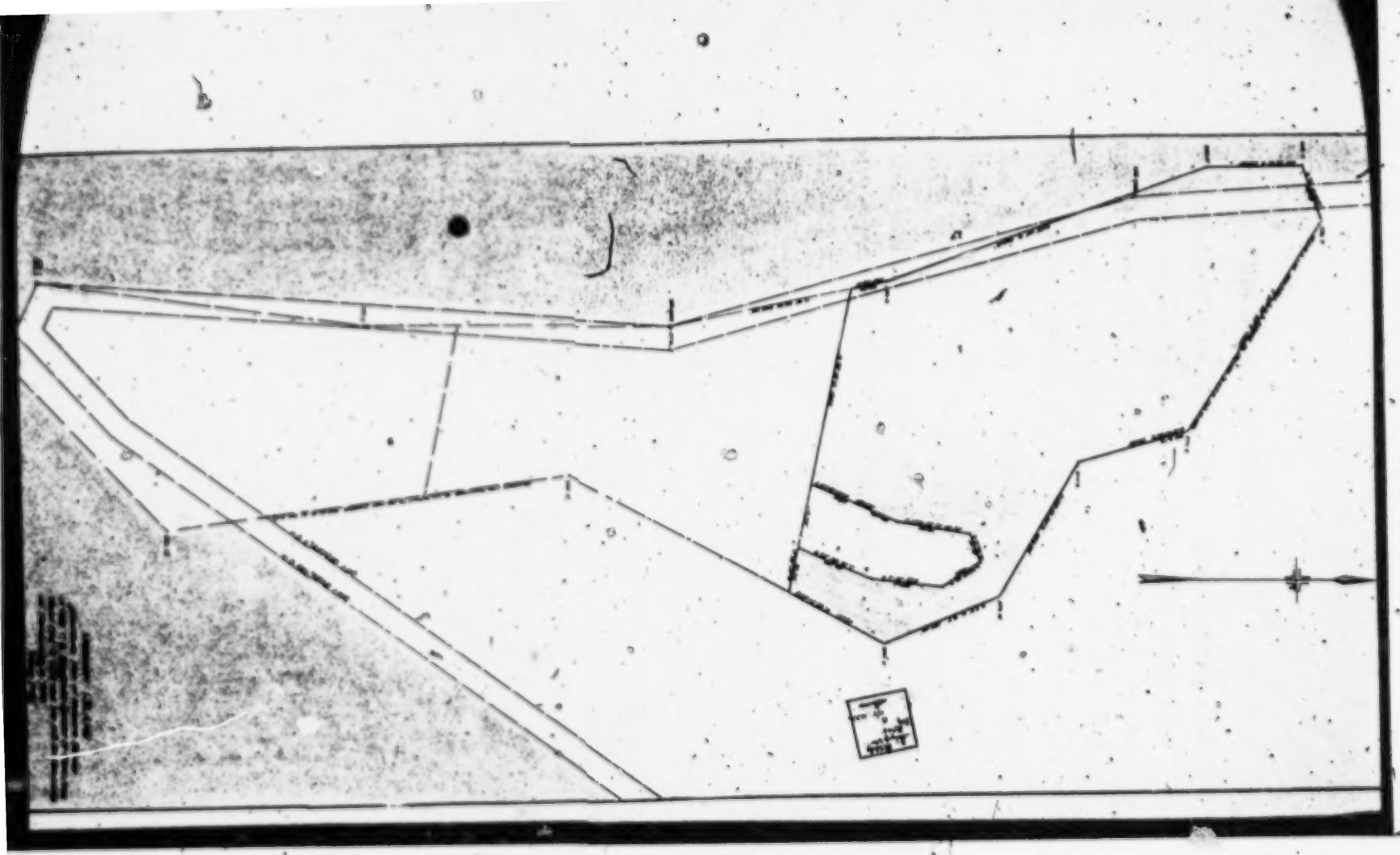
covery of the greater portion of the land so acquired by Borax Consolidated, Limited, upon the theory that same is and always has been tideland. The action (essentially one in ejectment) is a collateral attack upon the Federal patent under which petitioners claim title. [See finding, R. 170.] The complaint shows the patent to be the origin of defendants' title [R. 12], asserts the invalidity of the same on the ground that the "said lands at the time of the issuance of the said *pretended* patent or grant were not and no part thereof was public property of the United States * * * and the United States has not had at any time since September 9, 1850, jurisdiction to patent or grant or transfer said lands to said William Banning or to anyone else" [R. 12], and that therefore "said *attempted* patent or grant or conveyance of said lands or any part thereof was inoperative and *void and conveyed no title* whatsoever" [R. 12]. Plaintiff prays that its title be adjudged valid and that the claims of defendants be decreed to be "unlawful, invalid and without any right whatsoever" [R. 13].

Plaintiff's allegation that the demanded premises constitute tidelands [R. 8] was put in issue by the denials of the answer [R. 34, 715], which also contained, through an excess of caution, a "first, separate defense and * * * counterclaim" [R. 44], alleging with particularity the Government patent and defendants' title based thereon (the same issue raised in the traversing portion, at R. 37), and prayed [R. 93] that plaintiff take nothing by its bill and that defendants' title be quieted, etc.

Plaintiff's case was fully presented,—covering pages 187-633 of the Record and including a large Map Book of some twenty odd maps and other records. The trial court's ruling was confined to the issues raised by the denials and said first counterclaim [R. 185].

Copy of Plaintiff's Exhibit 2, opposite this page, reveals the true issue. The disputed area is colored; the City concedes the white portion (of the northerly end of the island) to be upland and claims all of the surrounding colored portion (wholly within the confines of the Norway survey) to be tideland [R. 210]. Norway's corners, as well as his traverses, are completely rejected. *But no fraud is claimed with respect to the survey.* Nor was there any claim of changes in the island boundary after the survey [R. 322-4]. Likewise plaintiff abandoned any effort to define the sinuosities of the shore between meander corners [R. 209-11, 213, 321].

The trial court in a written opinion [R. 161] held the patent to be conclusive evidence of the true location of the boundary line and made findings [R. 165] and entered a decree [R. 178] to the effect that the disputed premises are not and never have been tideland [R. 184] and that the title of Borax Consolidated, Limited, be quieted against all claims and pretensions of the City of Los Angeles. This decree was reversed by the Circuit Court of Appeals [R. 715].



Specifications of Error.

1. The Circuit Court of Appeals erred in holding that the Land Department has no jurisdiction "to determine the boundary line between the tideland belonging to the state and the upland belonging to the United States" and that "there was no attempt to exercise such jurisdiction".

2. The Circuit Court of Appeals erred in rejecting the authority of such cases as *Knight v. United Land Association,* 142 U. S. 161, and *Cragin v. Powell,* 128 U. S. 691, and in holding that the Federal patent is not conclusive evidence of the correct location of the boundary defined by ordinary high water mark.

3. The Circuit Court of Appeals erred in ruling that, as matter of law, the traverses of the Norway plat were not boundary lines and that the meander corners could be lawfully rejected.

4 The Circuit Court of Appeals erred in holding ordinary high water mark to be determined by the imaginary contour of mean high tide rather than the physical evidences wrought by the waters themselves (the test heretofore sanctioned by this court), or the line of the neap tides (as declared in the decisions of the California Supreme Court).

5. The Circuit Court of Appeals erred in holding that there is a substantial difference, in a quiet title (or ejectment) action, between a denial of plaintiff's title and a counterclaim or cross-action asserting defendants' title, and in holding that a judgment for defendant after trial of such issue can be reversed without an examination of the sufficiency of plaintiff's proofs.

Reasons for Granting the Writ.

1. This case involves important questions of Federal law which should be settled by this court, for it goes to the relations between the Federal and state governments growing out of admission to statehood, and particularly raises the question of whether the state succeeds to public lands (tide or upland) subject to existing power of the Federal Government to establish the boundaries of its own public domain, or whether such change of ownership ousts the jurisdiction of that special statutory tribunal of the Federal Government—the Land Department—which is charged with the duty of determining the quality and boundaries of all public lands.

Necessarily involved is the effect of the California Act of Admission (9 U. S. Stats. at L. p. 452), which specified that the state "through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and the right to dispose of, the same shall be impaired or questioned." [R. 44.]

Equally important is the question of what determines "ordinary high water mark", whether it is governed by judicial precedent or by modern engineering conception, whether by state or Federal law, and whether by former decisions of this court or by a new and theoretical rule first declared by the Circuit Court of Appeals in this case and now to be applied to titles originating over fifty years ago.

Likewise the question of whether the traverses of a governmental survey of an island belonging to its public domain must always be "meanders" as a matter of law,

with the corners subject to rejection as well as the lines, and the boundaries of the island thus left forever open to recanvassing through parol and the uncertain memories of witnesses.

Each of these questions as answered by the Circuit Court of Appeals strikes directly at the right of the Federal Government to carry out its constitutional "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, Sec. 3, Const.).

And these questions are live ones, of large public concern. The decision in *Boone v. Kingsbury,* 206 Cal. 148, which upheld legislation authorizing individuals to drill for oil on tidelands, is illustrative of the ever present importance of these problems, which potentially involve the boundaries of almost every parcel of land along the shores of California, Oregon and Washington, and perhaps the Atlantic Coast.

2. The holding that the Norway survey was without jurisdiction rests upon an assumed necessity for and absence of express statutory authority. Therein it is opposed to applicable decisions of this court, particularly *Cragin v. Powell,* 128 U. S. 691, 697-9; *Knight v. United Land Association,* 142 U. S. 161, 181; *Russell v. Maxwell Land Grant Co.,* 158 U. S. 253, 256, 258; *Stoneroad v. Stoneroad,* 158 U. S. 240, 247; and *Catholic Bishop of Nesqually v. Gibbon,* 158 U. S. 155, 167; in the last of which cases it is said:

> "It may be laid down as a general rule, that in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the

jurisdiction of the Commissioner of the General Land Office, under the supervision and direction of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

3. The holding that the Norway survey is not conclusive on boundary-location is in conflict with applicable decisions of this court, namely, *Knight v. United Land Association,* 142 U. S. 161; *Cragin v. Powell,* 128 U. S. 691; and *Russell v. Maxwell Land Grant Co.,* 158 U. S. 253, 258-9. If this be the law,

> "The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rests would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, *or was not properly located,* and, therefore, he could not be disturbed by the patentee." (142 U. S. at 189.)

The Circuit Court ruling particularly rests upon a misconception of the *Knight* case, which should be dissipated by authoritative exposition. That case directly passed upon the conclusiveness of a Land Department survey of tideland and in the face of the very contentions raised by appellant herein. The Circuit Court of Appeals conceived that case to turn upon the circumstance that the survey under consideration was made after confirma-

tion of a Mexican grant; but that feature of the case did not enter into this court's consideration of the conclusiveness of the survey, except as an introductory fact; the survey was not under the supervision of the court in any sense (see *Cragin v. Powell,* 128 U. S. at 697; 13 Stats. 332), and conclusiveness of the survey was decided before approaching a discussion of the effect of a Mexican grant; that discussion was in answer to a secondary contention that the court's decree of confirmation did not bind the sovereign state of California as to the title conveyed and confirmed,—a claim that a Mexican grant of tideland could not be good against the state; but, as the decree of confirmation had confined the pueblo boundary to "ordinary high water mark" (142 U. S. 169),and that phrase had been carefully inserted in the decree (*Id.* pp. 206-7), the discussion concerning the effect of the Mexican grant was really *obiter.*

4. The holding that traverses of an island survey are "meanders" as a matter of law is opposed to the controlling decision of *Producers' Oil Co. v. Hansen,* 238 U. S. 325, which rules the question to be one of fact.

This holding likewise so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, because it ignores the state of the pleadings and the admissions of the parties. The complaint assumes and inferentially alleges the demanded premises to be within the confines of the patent [R. 12-13]. The answer affirmatively asserted this [R. 48], and it was admitted by the reply [R. 113]. The trial judge so construed the pleadings [R. 161, 162]. At the trial counsel for plaintiff conceded: "that in 1881 a *patent was issued to these lands,* or purported patent

was issued to these lands to William Banning" [R. 187]; "that there was only a small portion of *that land which was described in the patent* that was upland, that was above the line of mean high tide, a very small area, and that the rest of it was tide land" [R. 211]. And appellant's brief below contains these admissions:

> "The lands involved in this action and described in paragraph XII of appellant's bill of complaint form *a part of Mormon Island.*" (page 1.)
>
> "*The land involved in this action* and described in paragraph XII of appellant's bill of complaint *is a portion of the land described in the patent issued to William Banning.*" (page 4.)
>
> "Appellant *admits* that the patent was issued to William Banning and *that the lands involved in this action* and described in paragraph XII of the bill of complaint *were a part of the area described in said patent.*" (page 2.)

These concessions relieved the defendants of the necessity of developing the facts and circumstances which would establish that the real intent and agreement was that the "meanders" should constitute boundaries.

5. In holding that mean high tide line is the property boundary, the Circuit Court of Appeals relied upon an English case *decided in 1854,* which is opposed to the rulings of this court in *Shively v. Bowlby,* 152 U. S. 1, 58; *City and County of San Francisco v. LeRoy,* 138 U. S. 656, 672; and *Knight v. United Land Association,* 142 U. S. 161. The principle of these cases is conceded in the Circuit Court's statement that "* * * the shore line is the boundary between tillable land or land avail-

able for agricultural purposes and land so frequently covered by the sea that it is useless for agricultural purposes" [R. 727], but, without Federal or state precedent, the court refused to apply the rule, rejecting it in favor of one theoretically more perfect.

6. In so holding, the Circuit Court decided an important question of local law in a way which is decidedly in conflict with applicable local decisions. While the question of what is the boundary is a Federal one (*Shively v. Bowlby*, 152 U. S. 1, 9; *Packer v. Bird*, 137 U. S. 661, 669; *Foss v. Johnstone*, 158 Cal. 119, 130), and has been established as "ordinary high water mark" (*Shively v. Bowlby*, 152 U. S. 1, 58), the incidents attaching to such title (whether the upland proprietor shall be recognized as owner to low water mark, the line of the neap tides or high tide line) are matters governed by state law exclusively (*Shively v. Bowlby*, 152 U. S. 1, 40; *Packer v. Bird, supra*); for, as said in *Barney v. Keokuk*, 94 U. S. 324:

> "If they (the respective states) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

California has done this very thing; it has resigned to riparian proprietors all title to land above the line of the neap tides. Thus, by a long line of decisions commencing with *Teschemacher v. Thompson*, 18 Cal. 11, 21, and including *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 442, *Oakland v. E. K. Wood Lumber Co.*, 211 Cal. 16, 23, and *Otey v. Carmel Sanitary Dist.*, 219 Cal. 310, 313, the line of the neaps has become the accepted criterion of the "ordinary high water mark" of Civil Code sections

670 and 830; and has crystallized into a rule of property in California (see *Minnesota Mining Co. v. National Mining Co.*, 3 Wall. 332). The Circuit Court of Appeals rejected the rule because not satisfied with it, but therein it ignored the authorities to the effect that Federal courts are bound by state rulings involving title to property or construing local statutes (*Port of Seattle v. Oregon & Washington R. Co.*, 255 U. S. 56, 63; *Shore v. Shell Petroleum Corporation*, 60 Fed. (2d) 1, 3 (10th C. C. A.); *U. S. v. Title Ins. & Tr. Co.*, 265 U. S. 472, 486).

7. In reversing the cause without reference to insufficiency of plaintiff's proofs, the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. Ninety-three pages of appellees' brief were devoted to an exposition of the insufficiency of plaintiff's proof of title. The Circuit Court refused to pass upon the point [R. 723].

Manifestly the ruling upon the counterclaim could not be prejudicially erroneous if plaintiff failed to prove a case under its complaint, because the essential and ultimate issues presented by the complaint and by the counterclaim were identical. In this regard the decision is contrary to the rulings of the Fifth Circuit in *Hines v. Martin*, 286 Fed. 653, and *Wood v. Collins*, 60 Fed. 139; prior decisions of the Ninth Circuit in *Sunset Tel. & Tel. Co. v. City of Eureka*, 122 Fed. 960 (C. C. N. D. Cal.), and *Miller & Lux v. Rickey*, 146 Fed. 574, 577, 579 (C. C. Nev., affirmed in 152 Fed. 11, 17, and in 218 U. S. 258); and of this court in *Milwaukee & Minnesota R. Co. v. Milwaukee & St. Paul R. Co.*, 6 Wall. 742, 747.

It is likewise opposed to the rulings of the California Supreme Court in *Larkin v. Superior Court*, 171 Cal. 719, and *Warden v. Stoll*, 210 Cal. 374.

Treated as an action in ejectment, the decision is likewise in conflict with rulings of this court and of other Circuits (*Hardin v. Jordan*, 140 U. S. 371, 379; *West v. East Coast Cedar Co.*, 113 Fed. 737, 740 (4th C. C. A.); *United States v. Pennsylvania & Lake Erie Dock Co.*, 272 Fed. 839, 842 (6th C. C. A.); *Hockett v. Alston*, 110 Fed. 910 (8th C. C. A.).

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the above mentioned cause should be granted.

Dated: April 22, 1935.

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